UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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| TYCO INTERNATIONAL, LTD. and TYCO INTERNATIONAL (US), INC., | : | |
| | : | No. 02 Civ. 7317 (TPG) |
| Plaintiffs/Counterclaim Defendants, | : | **ECF CASE** |
| v. | : | Oral Argument Requested |
| L. DENNIS KOZLOWSKI, | : | |
| Defendant/Counterclaim Plaintiff. | : | |

**MEMORANDUM OF LAW OF DEFENDANT/COUNTERCLAIM PLAINTIFF L. DENNIS KOZLOWSKI IN SUPPORT OF HIS MOTION FOR PARTIAL SUMMARY JUDGMENT**

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Defendant/counterclaim plaintiff L. Dennis Kozlowski, by his undersigned counsel, respectfully submits this memorandum of law in support of his motion, pursuant to Rule 56 of the Federal Rules of Civil Procedure and Rule 56.1 of the Local Rules, for partial summary judgment on his claims against plaintiff/counterclaim defendant Tyco International Ltd. ("Tyco") for (i) breach of the Executive Retirement Agreement and (ii) breach of Tyco's obligation to indemnify Mr. Kozlowski in connection with Stumpf v. Garvey.

## PRELIMINARY STATEMENT

In 1998, Tyco and its Chairman and Chief Executive Officer, L. Dennis Kozlowski, entered into a simple, unambiguous contract that guaranteed Mr. Kozlowski the right to receive a lump sum retirement benefit whenever he left the company, regardless of the circumstances. The contract was authorized by Tyco's Board of Directors and deferred compensation that Mr. Kozlowski otherwise would have received immediately. The terms of the contract are clear: "upon the termination of the Executive's employment with Tyco ***for any reason***," he "may elect to receive his executive retirement benefit in a Lump Sum Amount."

Nothing in this Executive Retirement Agreement imposes any condition or limit on payment related to the terms of Mr. Kozlowski's departure. It does not distinguish between termination for cause and termination without cause; it does not preclude payment in the event of misconduct, criminal conduct, or disloyalty; it does not distinguish voluntary from involuntary termination. In short, the Agreement does not include any of the many exceptions that a highly sophisticated global corporation like Tyco could have used to limit the circumstances in which the payment obligation might arise. To the contrary, the Agreement expressly provides that Tyco must pay the same lump sum amount no matter how, why or when Mr. Kozlowski left the company – whether through retirement, termination, or death. Under the plain language of the Agreement, termination "for any reason" means exactly what it says – "***any reason***."

In 2002, Mr. Kozlowski's employment was terminated just before the New York District Attorney's office announced his indictment for alleged sales tax violations. Mr. Kozlowski promptly notified Tyco that he was electing to receive his contractual retirement benefit in a lump sum, and requested payment. Tyco refused payment and denies that it is obligated to honor any contractual commitment to Mr. Kozlowski.

Unable to point to any limitation in the contract or under the Bermuda law that governs it, Tyco refuses to pay based on the extraordinary claim that New York's "faithless servant" doctrine applies and permits Tyco to claw back or disregard ***all*** of Mr. Kozlowski's compensation and contractual rights, including his rights under the Executive Retirement Agreement. Tyco's refusal is part of a sweeping strategy of aggressive self-help. Following Mr. Kozlowski's criminal conviction on larceny and related charges, Tyco received more than $150 million in restitution, equaling the sum total of all the money purportedly stolen. Tyco, however, has helped itself to much more. Specifically, Tyco has unilaterally seized nearly $100 million of Mr. Kozlowski's duly authorized and earned (but deferred) compensation, has refused to honor any of its contractual commitments to Mr. Kozlowski, and has taken the position that all of his compensation dating back to 1995 should be disgorged, even though it was duly authorized and earned and irrespective of the absence of any nexus between the compensation and the alleged wrong-doing.

While Tyco is certainly entitled to pursue its claims for damages in this action, its unilateral refusal to honor its commitment under the Executive Retirement Agreement, based on an obscure doctrine of New York employment law, is entirely without legal merit. New York law has nothing to do with this Bermuda contract. *Bermuda* law governs the Executive Retirement Agreement per the parties' express choice of law – and Bermuda law does not

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recognize any such defense to payment. The "faithless servant" doctrine is *not* the law of Bermuda and Bermuda does not impose complete forfeiture of compensation as damages for disloyalty. Nor does the British common law, to which Bermuda courts look for guidance, and which has specifically considered and explicitly rejected the notion that forfeiture of compensation could be an appropriate remedy for disloyal conduct by an employee. Applying Bermuda law, the analysis is simple – the contract unambiguously provides that Mr. Kozlowski is entitled to payment upon termination of employment "***for any reason***" and must be enforced as written.

Even if the court looked beyond the contract to consider whether Tyco could assert an independent claim for forfeiture due to faithlessness, Bermuda law would *still* apply. At all relevant times during Mr. Kozlowski's employment as an officer or director of Tyco, Tyco was a Bermuda corporation, organized under Bermuda law, with its principal place of business in Bermuda. Under well-established New York choice of law rules, Tyco's internal corporate affairs – including any duties of loyalty owed to Tyco by its officers or directors and any claims for breach of those duties and resulting damages – are governed by Bermuda law. In short, Tyco cannot avoid Bermuda law and cannot deny that it is liable if Bermuda law applies. Tyco's refusal to pay is simply an unexcused breach, and judgment is warranted as a matter of law.

Even under New York law, which does not apply on any theory, Tyco would be required to honor the Executive Retirement Agreement. Not even New York's "faithless servant" doctrine goes so far as to require complete forfeiture of ***all*** compensation, duly authorized and earned, regardless of the services performed. Under the New York doctrine, forfeiture is not appropriate unless the dishonesty and disloyalty has thoroughly infected the "most material and substantial part" of an employee's service. On that standard, Tyco's claim fails as a matter of

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law because Tyco cannot deny either that (i) the "most material and substantial part" of Mr. Kozlowski's service to Tyco was running the company as its CEO, or that (ii) he was tremendously successful at it. Through its long track record as a litigant, Tyco has asserted to everyone *other than* Mr. Kozlowski that the alleged looting was an "isolated" event that did not materially affect the well-being of the company or its shareholders. As Tyco repeatedly has argued, the company generated substantial real revenue growth throughout Mr. Kozlowski's tenure and for years following, which it has never materially restated. Indeed, during the seven years for which Tyco demands complete forfeiture of Mr. Kozlowski's compensation, 1995-2002, Tyco's net revenues *grew* from approximately $4.5 billion to over $35.5. billion. Even after the criminal convictions, Tyco Directors testified that it was in recognition of Mr. Kozlowski's contribution to the company's strong performance that Tyco entered into the Executive Retirement Agreement, deferring substantial amounts of compensation to be paid after he left the company. Whatever his faults, Tyco should not be permitted to both trumpet Mr. Kozlowski's success in its own defense and deny that he deserves any credit or compensation for it.

Tyco also is obligated to pay Mr. Kozlowski in connection with a separate claim – his demand for indemnification of costs and expenses in Stumpf v. Garvey, an action involving the initial public offering and secondary-market sale of shares in Tyco's telecommunications subsidiary, TyCom Ltd. As Tyco vigorously and successfully has argued, Mr. Kozlowski's criminal convictions and alleged looting have absolutely nothing to do with the allegations in Stumpf. The only surviving claims against Mr. Kozlowski are ***identical*** to the claims against Tyco and relate exclusively to alleged misstatements in TyCom's IPO prospectus and registration statement. These are precisely the type of acts by a corporate officer for which Mr.

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Kozlowski explicitly was indemnified under the Tyco Bye-Laws – but Tyco refuses to pay. That refusal is unexcused, and judgment is warranted as a matter of law.

BACKGROUND

Mr. Kozlowski was the President and CEO of Tyco from July 1992 through June 2002, and served as Chairman of Tyco's Board of Directors beginning in January 1993. SUF ¶ 1.[1] Under Mr. Kozlowski's leadership, Tyco grew from a relatively small manufacturing company with approximately 24,000 employees, $3.1 billion in net revenues and over $1.3 million in net income in fiscal year 1992, to a diversified global conglomerate with approximately 242,500 employees, over $34 billion in net revenues and over $3.4 billion in net income in 2001, his last full year with the company.[2] Although Mr. Kozlowski was indicted by the New York District Attorney's Office in 2002 and convicted on June 17, 2005 in connection with certain acquisition bonuses, business records and art purchases,[3] Tyco was no Enron. As Tyco's own reported earnings demonstrate, the company thrived under Mr. Kozlowski's leadership and remained strong after his departure. In 2003, for example, the first full year after Mr. Kozlowski left, Tyco employed approximately 258,600 people worldwide and had revenues of over $36.8 billion.[4]

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[1] References to the "SUF" herein refer to the Statement of Material Facts Not in Dispute Submitted Pursuant to Local Rule 56.1 by Defendant/Counterclaim Plaintiff L. Dennis Kozlowski in support of his Motion for Partial Summary Judgment.

[2] Declaration of Shannon Rose Selden in Support of the Motion for Partial Summary Judgment by Defendant/Counterclaim Plaintiff L. Dennis Kozlowski ("Selden Decl.") Ex. 12, Tyco Labs. Inc., Annual Report (Form 10-K), at 9, 19 (Sept. 17, 1993); Ex. 17, Tyco Int'l Ltd., Annual Report (Form 10-K), at 18 (Dec. 28, 2001); Ex. 19, Tyco Int'l Ltd., Annual Report (Form 10-K/A), at 26 (July 29, 2003). References to "Ex.__" herein refer to Exhibits to the Selden Decl.

[3] Ex. 48, Verdict Sheet, People of the State of New York v. Kozlowski, Indictment No. 5259-2002 (N.Y. Sup. Ct., County N.Y. June 17, 2005) ("Verdict Sheet").

[4] Ex. 20, Tyco Int'l Ltd., Annual Report (Form 10-K), at 12, 27 (Dec. 17, 2003).

Tyco has since broken itself up into three separate companies – an approach Mr. Kozlowski proposed as early as January 2002 – and each of those three entities continues to flourish.[5] In short, when Mr. Kozlowski ran Tyco, it became a growing, successful, and stable company, which generated substantial returns for its shareholders.

From 1997, when it completed a reverse-merger with Bermuda corporation ADT Ltd., through 2009, when it reincorporated in Switzerland, Tyco was a Bermuda corporation, "organized and exist[ing] under" the laws of Bermuda. SUF ¶ 2. Tyco has acknowledged that it was a Bermuda company, organized and governed under Bermuda law, with its principal place of business in Bermuda, including in its filings with the SEC, its answers in each of the pending MDL cases, and its briefing in MDL actions. Id. When it was a Bermuda corporation, Tyco's Bye-Laws and all of its internal corporate affairs were governed by Bermuda law. Id. Tyco had offices in Bermuda, id. ¶ 2(a), and its Board regularly met in Bermuda. Id. ¶ 2(b). Although Tyco maintained a branch office in New York beginning in 1995, its primary executive offices were in Exeter, New Hampshire until 1997, when Tyco acquired ADT, Ltd. in a reverse merger and relocated its executive offices to Boca Raton, Florida.[6]

### A. The Executive Retirement Agreement

In 1998, Tyco and Mr. Kozlowski entered into an Executive Retirement Agreement (the "ERA"). SUF ¶ 4. The ERA is "not an agreement of employment." Id. ¶ 6 (ERA § 1.1). It

[5] See Ex. 50, Press Release, Tyco Int'l Ltd., Tyco Announces Plan to Unlock Tens of Billions of Dollars of Shareholder Value, (Jan. 22, 2002) (announcing break-up plan); Ex. 51, Press Release, Tyco Int'l Ltd., Tyco International Declares Dividend In Connection With Company's Separation Into Three, Independent Publicly-Traded Companies, (June 7, 2007).

[6] Ex. 4, Amended Compl., Tyco Int'l, Ltd. v. Kozlowski, No. 02 Civ. 7317 (TPG) (S.D.N.Y.) (Apr. 1, 2003) ("Amended Complaint") at ¶¶ 18, 33.

expressly does ***not*** require Tyco to continue to employ Mr. Kozlowski, nor does it require Mr. Kozlowski to continue to provide services to Tyco. Rather, it is an agreement by Tyco to pay Mr. Kozlowski, or his beneficiary, a specified amount when one of three things happens: (i) he retires, (ii) his employment is terminated "for any reason," or (iii) he dies prior to retirement or termination. Id. ¶¶ 7, 10-11 (ERA §§ 2, 3 and 4).

Article 2 of the ERA governs retirement. It provides, in Section 2.1, that Mr. Kozlowski "shall be entitled to receive an executive retirement benefit" when he reaches the typical retirement age of sixty-five. Id. ¶ 7 (ERA § 2.1). The benefit is to "commenc[e] on the first day of the month next following actual retirement" and is "continuing during his lifetime." Id. The benefit is "payable in monthly installments, in the annual amount of $2,728,644," id., which the parties agreed to increase to just over $10 million by amendment effective March 1, 1999. Id. ¶ 9. Section 2.2 of the ERA goes on to provide Mr. Kozlowski with a choice. Instead of monthly installments, he could elect to receive a single lump sum:

> In lieu of the lifetime payments provided in Section 2.1, [Mr. Kozlowski] may elect an optional form which shall be a lump sum payment of the actuarial equivalent of the said lifetime payments (the "Lump Sum Amount").

Id. ¶ 8 (ERA § 2.2). Section 2.2 requires the optional Lump Sum Amount to be calculated as the "actuarial equivalence" of the monthly installments, using as assumptions "(i) the GAM 83 Mortality Table, and (ii) a seven percent (7%) annual rate of interest." Id.

Article 4 governs termination of employment and provides that if Mr. Kozlowski's employment is terminated "for any reason" before he retires, he is entitled to the same "Lump Sum Amount." Id. ¶ 11 (ERA § 4.1). Section 4.1 governs and provides in full:

> Upon the termination of [Mr. Kozlowski's] employment with Tyco ***for any reason***, [Mr. Kozlowski] may elect to receive his executive retirement benefit in a Lump Sum Amount. [Mr. Kozlowski] is fully vested in his executive retirement benefit at all times.

Id. (emphasis added).

The benefit in the event of death is the same. Under Article 3 of the ERA, if Mr. Kozlowski had died "prior to his retirement or other termination of employment, the death benefit payable to [Mr. Kozlowski's] named beneficiary shall be the Lump Sum Amount." Id. ¶ 10 (ERA § 3.1). Articles 2, 3 and 4 of the ERA, guaranteeing that Mr. Kozlowski or his beneficiary would receive the lump sum upon his departure, are the contract's core terms regarding the timing and amount of payment.

Under the ERA, if Tyco denies a claim for payment, its decision is subject to internal review. Pursuant to Section 8.1, a claim must be made to Tyco in writing within sixty days after notice that payment is denied. Id. ¶ 14 (ERA § 8.1). Tyco then must provide written notice within "ninety (90) days setting forth the specific reason for denial, specific reference to the provisions of this Agreement upon which the denial is based, and any additional material or information necessary to perfect the claim, if any." Id. The claimant has sixty days from receipt to request review of the denial, and Tyco in turn is obligated to "review the claim and provide a written decision within sixty (60) days." Id. Tyco's written decision must state "specific reasons for the decision and shall include reference to specific provisions of this Agreement on which the decision is based." Id.

In addition, the ERA provides that it "is subject to and shall be governed by the laws of Bermuda," id. ¶ 12 (ERA § 7.4), where Tyco was incorporated when the ERA was entered and where it remained incorporated through 2009. Id. ¶ 2. It is fully integrated, id. ¶ 13 (ERA § 7.6), and became effective as of October 1, 1998. Id. (ERA § 7.7). The ERA was authorized by Tyco, adopted by formal resolution of the Compensation Committee of Tyco's Board of Directors (the "Compensation Committee") at a Board meeting in Bermuda, and disclosed in

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proxy statements filed by Tyco with the Securities and Exchange Commission. Id. ¶¶ 3-4. Tyco and Mr. Kozlowski executed the ERA on March 1, 1999. Id. ¶ 4.

While the ERA is fully integrated and creates the independent payment obligations set forth in Articles 2, 3, and 4, it also reflects the deferral of compensation that otherwise would have been payable to Mr. Kozlowski in 1998 and 1999, when the ERA was entered and amended.[7] Under Tyco's long-standing pay-for-performance formula, Tyco's results – which in 1998 included reported income of over $1.1 billion, net revenues of over $19 billion and per share earnings of more than $0.70[8] – were used to calculate bonuses for certain high-ranking executives, including Mr. Kozlowski,[9] which they had the right to receive immediately.[10] The Compensation Committee approved the ERA after discussion at their October 21, 1998 meeting, during which Mr. Kozlowski and the Committee agreed that he would forego immediate payment of his 1998 bonus in favor of a separate executive retirement contract deferring compensation over time.[11]

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[7] Ex. 31, Transcript of Deposition of Stephen Foss (May 11, 2007) ("Foss 5/11/07 Dep."), at 666:5-668:24, 674:5-675:22; Ex. 28, Minutes of a Meeting of the Tyco Int'l Ltd. Comp. Comm. (Oct. 21, 1998); Ex. 29, Minutes of a Meeting of the Tyco Int'l Ltd. Comp. Comm., (Oct. 13, 1999); Ex. 30, Minutes of a Meeting of the Tyco Int'l Ltd. Comp. Comm., (Oct. 15, 1999).

[8] Ex. 19, Tyco Int'l Ltd, Annual Report (Form 10-K/A), at 26 (July 29, 2003) (noting that in 1998 Tyco reported net revenues of $19,061.7 billion, net income of $1.174.7 billion and per share earnings of $0.74 and restating those earnings to report net revenues as $19,066.8 billion, net income as $1,117.0 billion and per share earnings of $0.71).

[9] Ex. 31, Foss 5/11/07 Dep., at 665:14-667:13.

[10] Id. at 667:14-18, 668:1-10.

[11] Transcript of Deposition of Stephen Foss (May 9, 2007) ("Foss 5/9/07 Dep."), at 154:4-155:2, Foss 5/11/07 Dep., at 667:14-668:24; Ex. 32, Transcript of Deposition of L. Dennis Kozlowski (Oct. 31, 2007), at 1058:24-1059:19.

Tyco's 1999 results again producing a substantial bonus for Mr. Kozlowski under the governing incentive plan,[12] when Tyco reported over $22.4 billion in net revenues and exceeded its targets for earnings per share, pretax income and operating cash flow.[13] As in 1998, Mr. Kozlowski had the option to receive that bonus immediately,[14] but agreed to forgo it in favor of deferred payment pursuant to an amendment to the ERA.[15] In October 1999, the ERA was amended to increase the amount specified in Section 2.1 to just over $10 million. SUF ¶ 9. The Amendment did not alter any other terms of the contract and explicitly provided that "the Executive Retirement Agreement is hereby confirmed in all other respects." Id.

According to Tyco, as of October 2008, the value of Mr. Kozlowski's ERA account was $75.9 million. Id. ¶ 15.

B. Tyco's Refusal to Satisfy its Payment Obligations Under the ERA.

On June 2, 2002, Mr. Kozlowski's employment was terminated. Id. ¶ 16. Following his termination, Mr. Kozlowski asserted his rights under the ERA, by informing Tyco that he was electing to receive the Lump Sum Amount pursuant to Sections 4.1 and 2.2, and demanding payment. Id. ¶ 17. Tyco refused to honor the contract. Instead, it denied payment, id. ¶ 18, and

[12] Ex. 31, Foss 5/11/07 Dep., at 666:5-668:24, 674:5-675:22.

[13] Ex. 15, Tyco Int'l Ltd, Annual Report (Form 10-K), at 32 (Dec. 13, 1999); see also Ex. 19, Tyco Int'l Ltd., Annual Report (Form 10-K/A), at 26 (July 29, 2003) (restating 1999 revenues as $22,494.1 billion, net income as $873.7 billion and per share earnings of $0.53).

[14] Id. at 667:14-18, 668:1-10.

[15] Id. at 674:5-674:9, 675:14-676:9.

cited the New York "faithless servant" doctrine as its basis for withholding the money.[16] Tyco informed Mr. Kozlowski that it had concluded that "because of [his] conduct," Mr. Kozlowski's benefits "attributable to compensation from 1995 forward are forfeited."[17] Mr. Kozlowski timely requested review of the denial. SUF ¶ 19. He also asked Tyco to place the amounts owed under this contract and others in escrow until the dispute could be resolved. Id. ¶ 20. Tyco refused. Id. ¶ 21. When it finally provided its written decision, Tyco still refused to honor the agreement. Id. ¶ 22. Instead, Tyco insisted that Mr. Kozlowski had been disloyal and breached his fiduciary duties to the company.[18] The Committee asserted that as a "faithless servant" under New York law, Mr. Kozlowski had forfeited benefits under the ERA, as well as all other compensation from 1995 forward.[19] In the fourteen months between his request for review and Tyco's decision, Mr. Kozlowski filed this counterclaim, seeking to recover amounts owed under the contract, among other claims.[20]

[16] Ex 36, Letter from Jane F. Greenman on behalf of the Special Appeals Comm., Tyco Int'l (US) Inc., to L. Dennis Kozlowski, (May 13, 2004) (delivered May 17, 2004) ("May 13, 2004 Greenman Letter"), at 3-4.

[17] Id. at 3.

[18] Ex. 41, Letter from Jane F. Greenman on behalf of the Special Appeals Comm., Tyco Int'l (US) Inc., to L. Dennis Kozlowski, (Sept. 15, 2005) ("Sept. 15, 2005 Greenman Letter"), at 3 and Appendix at TYSC-LDK-0008.

[19] Id.

[20] Ex. 5, Answer, Affirmative Defenses and Counterclaims of L. Dennis Kozlowski, Tyco Int'l, Ltd. v. Kozlowski, No. 02 Civ. 7317 (TPG) (S.D.N.Y.) (Apr. 9, 2004) ("Answer and Counterclaims"), at ¶¶ 15-20 and 51-56.

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C. Restitution

In refusing to honor its obligations under the ERA, Tyco has asserted that Mr. Kozlowski took four allegedly unauthorized bonuses, in connection with acquisitions involving Tyco subsidiaries TyCom and Flag Telecom, Tyco's reverse merger with the home security company ADT, Ltd. and a $25 million bonus he received in 1999.[21] Tyco also alleges that Mr. Kozlowski took loans under Tyco's relocation loan and Key Employee Loan ("KEL") programs for purposes not authorized under the governing documents.[22] These same allegations also formed the factual nucleus of the New York State criminal prosecution against Mr. Kozlowski, who was convicted of grand larceny counts in connection with the four bonuses, as well as certain artwork and a payment to Tyco outside director Frank Walsh, and of false business record counts in connection with his use of the loan programs.[23]

Mr. Kozlowski has returned to Tyco all of the money he was alleged to have stolen. As part of his sentence, Mr. Kozlowski paid restitution to Tyco of $98 million – representing the sum total of the four allegedly unauthorized bonuses.[24] Mark Swartz, Tyco's Chief Financial Officer, also was convicted in connection with the bonuses and also paid full restitution as part of his criminal sentence in New York State court, in the amount of $38 million.[25] Frank Walsh, Tyco's former director, also reimbursed Tyco for the $20 million paid to him in connection with

[21] Ex. 41, Sept. 15, 2005 Greenman Letter, Appendix at TYSC-LDK-0007.

[22] Id.

[23] Ex. 48, Verdict Sheet.

[24] Ex. 49, Stipulation and Order, Morgenthau v. Kozlowski, Index No. 403698/02 (N.Y. Sup. Ct., County N.Y. Nov. 17, 2006), at 2, ¶¶ 1, 7.

[25] Id. ¶ 2.

Tyco's acquisition of CIT, following his guilty plea in New York State court.[26] Tyco made a case-by-case determination about whether to seek the return of money paid to each of the other recipients of the allegedly improper TyCom bonus, and either got the money back or voluntarily chose not to do so.[27] Tyco also took possession of the apartment, artwork and furnishings allegedly purchased by Mr. Kozlowski with Tyco's money when Mr. Kozlowski was forced out in 2002.

D. *Stumpf v. Garvey* and Mr. Kozlowski's Request for Indemnification.

While Tyco and Mr. Kozlowski are adversaries in this action, they are co-defendants in numerous other actions in which plaintiffs attempted to tie securities claims to the alleged looting at issue in the criminal proceedings. The vast majority of those cases were consolidated for pre-trial proceedings in the District of New Hampshire, by order of the Judicial Panel on Multidistrict Litigation. Tyco and Mr. Kozlowski vigorously defended those actions and have disputed that any activity that was the subject of the criminal case caused losses to Tyco shareholders.[28] Many, if not most, of those cases have been settled and dismissed.

Not all of the cases have settled, however. In one, an action brought by shareholders of TyCom, a telecommunications subsidiary engaged in the undersea cable business, plaintiffs

[26] Ex. 33, Transcript of Deposition of Frank Walsh (Oct. 2, 2007), at 185:17-186:7.

[27] Ex. 31, Foss 5/9/07 Dep., at 117:7-118:1.

[28] See, e.g., Ex., 54, Report of Daniel R. Fischel, Ballard v. Tyco Int'l Ltd., 04 cv 00411, (S.D.N.Y.) (Feb. 25, 2008), at ¶ 14 ("adverse changes in economic conditions can explain much of Tyco's stock price decline") and ¶¶ 15-16, 27-31 (discussing numerous alternate potential causes of losses); Ex. 55, Report of Daniel R. Fischel, Sciallo v. Tyco Int'l Ltd., MDL No. 1335, 03-CV-1354, (D.N.H.) (Feb. 25, 2008), at ¶ 15 (citing "adverse changes in economic conditions unrelated to the alleged fraud" as alternate causes of alleged losses); Ex. 56, Report of Daniel R. Fischel, State of N.J. v. Tyco Int'l Ltd., MDL No. 1335, Civ. No. 03-1337-B, (D.N.H.) (Mar. 24, 2008), ¶¶ at 15-23, 26, 31-32 (same).

allege that the prospectus for TyCom's Initial Public Offering ("IPO") in 2000 misrepresented the global demand for undersea cable. SUF ¶ 23. Mr. Kozlowski requested indemnification from Tyco for the costs incurred in his defense of the TyCom action, but his request has been denied. Id. ¶ 28.

1. The TyCom Action

Like the claims against Tyco and TyCom, the surviving claims against Mr. Kozlowski relate exclusively to alleged misstatements regarding the projected demand for undersea bandwidth. As Tyco puts it, the plaintiffs in Stumpf v. Garvey allege that they suffered damages "when, independent of the general telecom decline, their share price dropped because the market learned in early 2001 that predictions in TyCom's July 2000 IPO Prospectus about future bandwidth demand were false." SUF ¶ 26. Although the Stumpf plaintiffs' initial complaint attempted to tie these allegations regarding the global demand for undersea cable to the 2002 "looting" disclosures, Tyco successfully defeated that argument. On Tyco's motions, the Court rejected any argument purporting to tie the "looting" disclosures to the TyCom action, and by Opinions and Orders dated September 2, 2005 and January 6, 2006, dismissed all of the claims against Mr. Kozlowski and Tyco related to "looting." Id. ¶ 24.

In their moving papers, Tyco and Mr. Kozlowski agreed that none of the remaining claims have anything to do with alleged dishonesty and fraud by Mr. Kozlowski. Id. ¶¶ 25-26. Tyco forcefully argued that whether or not "Kozlowski and Swartz took unauthorized payments from *Tyco* months *after* the TyCom IPO has no bearing on whether TyCom knew projections" regarding demand for undersea cable were sound – which is the sole dispute in the TyCom litigation. Id. ¶ 26. In short, Mr. Kozlowski is a defendant in the TyCom litigation solely because he was a signatory of the offering documents in his role as Tyco's CEO.

2. Indemnification

Tyco's Bye-Laws mandate indemnification of officers and directors to the full extent permitted under Bermuda law. Section 102 of the Bye-Laws states:

> Every Director, Secretary and other officer of the Company shall be indemnified by the Company against, and it shall be the duty of the Directors out of the funds of the Company to pay, all costs, losses and expenses which any such officer may incur or become liable to by reason of any contract entered into, or any act or thing done by him as such officer, or in any way in the discharge of his duties Provided always that the indemnity contained in this Bye-Law shall not extend to any matter which would render it void pursuant to the Companies Acts.

SUF ¶ 27.

Section 98 of the Bermuda Companies Act 1981 ("Companies Act") governs the permissible scope of indemnification of an officer by a company.[29] Under Section 98, a company may indemnify an officer for "any loss arising or liability attaching to him by virtue of any rule of law in respect of any negligence, default, breach of duty or breach of trust of which the officer or person may be guilty in relation to the company or any subsidiary thereof." Companies Act, § 98(1). A company may indemnify an officer against any liability except those which "by virtue of any rule of law would otherwise attach to him in respect of any fraud or dishonesty of which he may be guilty in relation to the company." Companies Act, § 98(2). Noting that the Stumpf action does not involve any allegations of fraud or dishonesty in relation to Tyco, Mr. Kozlowski invoked his right to indemnification under the Bye-Laws and sought compensation for his defense costs and expenses. Tyco has refused to pay. SUF ¶ 28.

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[29] Ex. 2, Decl. Saul M. Froomkin (Mar. 3, 2010) ("Froomkin Decl.") ¶ 5D(ii).

## PROCEDURAL HISTORY

This action began on September 12, 2002, when Tyco filed its initial complaint against Mr. Kozlowski. It was assigned to this Court along with a parallel action by Tyco against Mark Swartz, Tyco's former Chief Financial Officer. Along with Tyco, Messrs. Kozlowski and Swartz also were defendants in a number of class and individual actions attempting to assert claims arising under federal securities law and the law of various states. The vast majority of those civil actions were referred to the Judicial Panel on Multidistrict Litigation (the "MDL Panel") and assigned to the District of New Hampshire, where they joined an earlier class action against Tyco. By order dated May 8, 2003, the MDL Panel transferred this case to the District of New Hampshire as well, to be consolidated for pre-trial proceedings with the other pending actions.

In the MDL proceeding, Mr. Kozlowski filed an Answer, Affirmative Defenses and Counterclaims on April 9, 2004.[30] Tyco answered the Counterclaims on April 29, 2004.[31] While the case was pending in New Hampshire, the parties engaged in consolidated discovery and pretrial proceedings.

After discovery had been completed and the major class actions against Tyco and Mr. Kozlowski had been settled and dismissed, the Court in New Hampshire determined that this case was ripe for remand and recommended that it be returned to this Court.[32] The MDL Panel

[30] Ex. 5, Answer and Counterclaims.

[31] Ex. 6, Reply of Tyco Int'l Ltd. and TME Mgmt. Corp. to Counterclaim of L. Dennis Kozlowski, Tyco Int'l, Ltd. v. Kozlowski, No. 02 Civ. 7317 (TPG) (S.D.N.Y.) (Apr. 29, 2004).

[32] Ex. 47, Suggestion of Remand, In re Tyco Sec. Litig., Case No. 02-md-1335-B (D.N.H. Aug. 3, 2009).

issued a Conditional Remand Order on August 24, 2009, and the matter arrived in the Southern District as of November 25, 2009.

Upon returning to this Court, the parties agreed on a schedule for cross-motions for summary judgment, which this Court entered by Stipulation and Scheduling Order dated February 16, 2010.

## ARGUMENT

Summary judgment "should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); see also Int'l Bus. Machs. Corp. v. Liberty Mut. Fire Ins. Co., 303 F.3d 419, 423 (2d Cir. 2002) (summary judgment may be granted "if it can be established that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law") (internal quotation marks and citation omitted); see also Tingling v. Great Atl. & Pac. Tea Co., No. 02-cv-4196 (NRB), 2003 WL 22973452, at *2 (S.D.N.Y. Dec. 17, 2003) (a federal court sitting in diversity applies the federal standard of summary judgment). "[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." Anderson v. Liberty Lobby, 477 U.S. 242, 247-48 (1986) (emphasis in original); see also Quarles v. General Motors Corp., 758 F.2d 839, 840 (2d Cir. 1985 ) (per curiam) (affirming grant of summary judgment where factual issues were not material to the claims). In a contract dispute, summary judgment may be granted "when the contractual language on which the moving party's case rests is found to be wholly unambiguous and to convey a definite meaning." Topps Co., Inc. v. Cadbury Stani S.A.I.C., 523 F.3d 63, 68 (2d Cir. 2008) (citation omitted).

I. Mr. Kozlowski is Entitled to Payment Under the Clear and Unambiguous Terms of the ERA.

A. The ERA Is Unambiguous and Requires Payment of the Lump Sum Amount.

The ERA provides that "***upon termination of his employment for any reason***, [Mr. Kozlowski] may elect to receive his executive retirement benefit in a lump sum amount." SUF ¶ 11 (ERA § 4.1) (emphasis added). The contract is unambiguous, fully integrated, id. ¶ 13 (ERA § 7.6), and was adopted and approved by formal resolution of Tyco's Compensation Committee. Id. ¶ 3. It is governed by Bermuda law, id. ¶ 12 (ERA § 7.4), and should be enforced as written. See Columbia Savings & Loan Assoc. v. Am. Int'l Group, Inc., No. 91 Civ. 0598 (MJL), 1994 WL 114828, at *4 (S.D.N.Y. Mar. 31, 1994) (adopting conclusion that where the language of a contract "is unambiguous on its face, under Bermuda law the Court should give the contractual terms their plain meaning without looking outside the terms of the contract"). As set forth in the Declaration of Saul M. Froomkin, a Queen's Counsel, former Attorney General of Bermuda and Bermuda law expert, "the words of Clause 4.1 of the said Retirement Agreement being clear and unambiguous, a Court in Bermuda would give those words their ordinary meaning".[33]

By the Agreement's plain terms, only three facts are material and all three are undisputed: (i) Mr. Kozlowski's employment was terminated, SUF ¶ 16, (ii) he has "elect[ed] to receive his executive retirement benefit in a lump sum amount," id. ¶ 17, and (iii) Tyco refuses to pay. Id. ¶¶ 18-22. Tyco's refusal is nothing more than an unexcused breach of an unambiguous contract, for which it is liable as a matter of law.

[33] Ex. 2, Froomkin Decl. ¶ 5A(x); see also id. ¶¶ 5A(i)-(x) (discussing Bermuda law regarding the interpretation and enforcement of contracts).

B. Mr. Kozlowski's Employment Was Terminated, for Reasons That Are Immaterial as a Matter of Law.

Tyco admits that Mr. Kozlowski's employment was terminated on June 2, 2002. Id. ¶ 16. That fact alone gave him the right "to elect to receive his executive retirement benefit in a lump sum amount," and imposed on Tyco the obligation to pay it. Id. ¶ 11 (ERA § 4.1). Under the plain language of the contract, the reason behind the termination is immaterial.[34] Nothing in the terms of the ERA governing payment imposes any condition or limit based on the terms of Mr. Kozlowski's departure: the ERA does not distinguish between termination for cause and termination without cause; it does not preclude payment in the event of misconduct, criminal conduct, or disloyalty; and it does not distinguish voluntary from involuntary termination.[35] In short, the ERA does not include any of the many exceptions that a highly sophisticated global company like Tyco could have used to limit the circumstances in which it would be obliged to pay.

That the parties intended "for any reason" to mean ***any reason at all***, including termination for misconduct, criminal activity or disloyalty, is evident from the fact that the entire agreement is structured and drafted to ensure that Mr. Kozlowski or his beneficiaries would receive the lump sum amount no matter how he left Tyco – whether through retirement, termination, or death.

The terms are stark:

- Article 2 governs retirement and provides that Mr. Kozlowski "shall be entitled to receive an executive retirement benefit commencing on the first day of the month

[34] Ex. 2, Froomkin Decl. ¶ 5A(i) (under Bermuda law, "there is no choice to be made between different meanings; the clear terms must be applied even if the court thinks some other terms would be more suitable"); see also id. ¶¶ 5A(ii)-(viii).

[35] See Ex. 1, ERA.

next following actual retirement and continuing during his lifetime." SUF ¶¶ 7-8 (ERA, §§ 2.1, 2.2). Section 2.2 provides the option to receive a "Lump Sum Amount": "In lieu of the lifetime payments provided in Section 2.1, ***the Executive may elect an optional form of payment which shall be a lump sum payment*** of the actuarial equivalent" of the lifetime installments, defined as the "Lump Sum Amount." Id. (emphasis added).

- Article Three requires payment of the same "Lump Sum Amount" in the event of death. Id. ¶ 10 (ERA § 3.1). Section 3.1 is unambiguous: "[i]n the event of the death of the Executive prior to his retirement or other termination of employment, the death benefit payable to the Executive's named beneficiary ***shall be the Lump Sum Amount***." Id. (emphasis added).

- Article Four governs termination of employment, as the third and the last of the contract's three core terms. Consistent with Articles 2 and 3, Article 4, Section 4.1 provides that "[u]pon the termination of [his] employment with Tyco for any reason," Mr. Kozlowski "***may elect to receive his executive retirement benefit in a Lump Sum Amount***." Id. ¶ 11 (ERA § 4.1) (emphasis added).

Read in the context of the ERA as a whole, as Bermuda law requires,[36] Section 4.1 is fully consistent with the express terms and plain purpose of the contract: to ensure that Tyco made the exact same "Lump Sum Amount" payment to Mr. Kozlowski whenever his employment ended, regardless of the circumstances.

C. Mr. Kozlowski Elected to Receive the Lump Sum Amount and Tyco Refused to Pay.

Tyco does not dispute that Mr. Kozlowski promptly "elect[ed] to receive his executive retirement benefit in a Lump Sum Amount," when his employment was terminated, nor does Tyco deny that it refused to pay. SUF ¶¶ 17-22. Mr. Kozlowski made his election by letter dated November 8, 2002 to the Chairman of Tyco's Compensation Committee. Id. ¶ 17. The Special Appeals Committee of Tyco discussed Mr. Kozlowski's claim at its meeting on February

[36] Ex. 2, Froomkin Decl. ¶ 5A(ii) (under Bermuda law a contract should be read as a whole, to give effect to the terms as written).

19, 2004, and rejected it by letter delivered on May 17, 2004. Id. ¶ 18.[37] Mr. Kozlowski reasserted his election in his Counterclaims filed on April 9, 2004. At the same time, he appealed the decision of the Special Appeals Committee by letter dated July 15, 2004. SUF ¶ 19. In that letter, Mr. Kozlowski requested that Tyco hold the amount in escrow until this litigation is resolved. Id. ¶ 20. By letter dated July 27, 2004, Tyco refused. Id. ¶ 21. Tyco then denied Mr. Kozlowski's appeal, by letter dated September 15, 2005. Id. ¶ 22. None of these facts are disputed and all confirm that Mr. Kozlowski elected – promptly, repeatedly, and following the procedures set forth in the claims provision of the ERA – to receive his retirement benefit in a lump sum amount.

D. Tyco's Refusal to Pay is Baseless.

Despite Mr. Kozlowski's termination of employment and prompt election of payment, Tyco consistently has refused to honor the ERA. At each opportunity, Tyco has relied on the "faithless servant" doctrine, insisting that that doctrine of New York law justifies withholding funds under this Bermuda contract.[38] Tyco's refusal is part of a sweeping strategy to deny Mr.

[37] See Ex. 36, May 13, 2004 Greenman Letter, at 3.

[38] Ex. 36, May 13, 2004 Greenman Letter, at 3; Ex. 41, Sept. 15, 2005 Greenman Letter, at 3 and Appendix at TYSC-LDK-0008.

In addition, in a quasi-contractual argument in support of its "faithless servant" approach, Tyco has relied on a preliminary "whereas" clause noting the importance to Tyco of "the assurance of the continued services and loyalty" of Mr. Kozlowski. Tyco's reliance is misplaced. Under Bermuda law, a preliminary recitation like the "whereas" clause does not on its face impose any independent contractual rights. Ex. 2, Froomkin Decl. ¶ 5A(viii) (under Bermuda law, "whereas" clauses do not control or qualify the unambiguous operative terms of the contract). That is particularly so where, as here, a preliminary recitation is directly at odds with the contract's unambiguous operative terms. Id. ¶¶ 5A(vii)-(x). The operative terms of the contract expressly do ***not*** require Tyco to continue to employ Mr. Kozlowski or Mr. Kozlowski to continue to provide services to Tyco. SUF ¶ 7 (ERA § 1.1). "Notwithstanding anything herein contained to the contrary, this Agreement is not an

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Kozlowski *any* right to any payment under any contracts or for any services performed for Tyco since 1995, on the untenable notion that the New York faithless servant doctrine applies and that ***all*** of Mr. Kozlowski's "compensation from 1995 forward are forfeited."[39] Tyco's argument is baseless. New York law has nothing to do with this Bermuda contract. *Bermuda* law governs the ERA per the parties' express choice of law – and Bermuda law does not recognize any such defense to payment.

1. New York's Faithless Servant Doctrine Does Not Apply to the ERA.

a. The ERA is Governed by Bermuda Law.

Tyco and Mr. Kozlowski expressly agreed that Bermuda – not New York – law would govern their rights and obligations under the ERA. Section 7.4 is unambiguous: the ERA "is subject to and shall be governed by the laws of Bermuda." SUF ¶ 12 (ERA § 7.4). The fact that Mr. Kozlowski was convicted in a New York state court, years after the contract was entered and on charges that had nothing to do with this contract, is irrelevant as a matter of law. In this diversity action between a Bermuda company and its former CEO, New York choice-of-law rules apply and require deference to the parties' choice.

Indeed, rejecting the parties' express choice and unsettling their bargained-for expectations is anathema to New York's well-established choice of law principles. New York recognizes that honoring the parties' choice of law advances "one of the prime objectives of contract law, which is to protect the justified expectations of the parties and allow them to

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agreement of employment." Id. There is no contractual support for Tyco's refusal to pay under the faithless servant doctrine or any other theory.

[39] Ex. 41, Sept. 15, 2005 Greenman Letter, at 3 and Appendix at TYSC-LDK-0008.

foretell with accuracy what will be their rights and liabilities under the contract. This policy of certainty, convenience and predictability of result is crucial, and demands that the parties should have power to choose the applicable law." Valley Nat'l Bank v. Greenwich Ins. Co., 254 F. Supp. 2d 448, 456 (S.D.N.Y. 2003) (internal citation and quotation marks omitted). Accordingly, under New York law, a court should defer to the parties' express choice of law as long as (i) the jurisdiction has a substantial relationship to the parties or their performance of the contract and (ii) applying the law of the foreign jurisdiction would not violate the fundamental policies of New York law. Woodling v. Garrett Corp., 813 F.2d 543, 551 (2d Cir. 1987); see Wombles Charters Inc. v. Orix Credit Alliance, Inc., No. 97 Civ. 6186 (JSM), 1999 WL 498224, at *1 (S.D.N.Y. July 14, 1999) (honoring choice of law provision where company was incorporated and had its principal place of business in selected state).

Here, Bermuda has an unquestionably substantial relationship to the parties and the contract, as Tyco has repeatedly and indisputably acknowledged. From 1997 through 2009 – which includes all times relevant to this claim – Tyco was a Bermuda company, organized and governed under Bermuda law, as it asserted at every opportunity, including: (i) its filings with the SEC, (ii) its answers in each of the pending MDL cases, and (iii) its briefing in other MDL actions. SUF ¶ 2. Tyco's Bye-Laws and all of its internal corporate affairs similarly were governed by Bermuda law. Id. ¶¶ 2, 2(a). Tyco had its principal place of business in Bermuda, id. ¶ 2(a), and its Board regularly met in Bermuda. Id. ¶ 2(b).

That Tyco was a Bermuda corporation makes the relationship between the parties and their jurisdiction "substantial" for the additional reason that, under the internal affairs doctrine, Bermuda law governs the fiduciary obligations of corporate officers to the company. Under New York choice-of-law rules, claims related to "the rights and liabilities of a corporation" are governed by the internal affairs doctrine, which applies the law of the state of incorporation. In re BP P.L.C. Derivative Litig., 507 F. Supp. 2d 302, 307 (S.D.N.Y. 2007); see also, e.g., Walton v. Morgan Stanley & Co. Inc., 623 F.2d 796, 798 n.3 (2d Cir. 1980) ("New York law dictates that the law of the state of incorporation governs an allegation of breach of fiduciary duty owed to a corporation."); BBS Norwalk One, Inc. v. Raccolta, Inc., 60 F. Supp. 2d 123, 129 (S.D.N.Y. 1999) (under New York law "a claim of breach of fiduciary duty owed to a corporation is governed by the law of the state of incorporation"); Buckley v. Deloitte & Touche USA LLP, No. 06 Civ. 3291 (SHS), 2007 WL 1491403, at *13 (S.D.N.Y. May 22, 2007) (same). Tyco itself has argued successfully and repeatedly that Bermuda law should apply to its internal affairs, including to derivative claims for breach of fiduciary duty. See In re Tyco Int'l, Ltd., 340 F. Supp. 2d 94, 96 n.2 (D.N.H. 2004); Levin v. Kozlowski, No. 602113/02, 2006 WL 3317048 (N.Y. Sup. Ct. Nov. 14, 2006), aff'd 846 N.Y.S.2d 37 (N.Y. App. Div. 1st Dep't 2007).[40]

Applying Bermuda law to this claim for breach of contract also is wholly consistent with New York policy. New York policy strongly favors the enforcement of contracts, and New York courts do not lightly overturn "a deliberately prepared and executed written instrument" that is presumed to "manifest[] the true intention of the parties." Travelers Indem. Co. of Ill. v. CDL

[40] As these cases make clear, because the internal affairs doctrine applies to claims ***by a company against its fiduciary regarding duties owed by that fiduciary to the company***, Bermuda law applies whether Tyco contends that the "faithless servant" doctrine is a separate tort claim or an affirmative defense. The characterization makes no difference – under the internal affairs doctrine or under the contract, Bermuda law would *still* apply. See Lazard Freres & Co. v. Protective Life Ins. Co., 108 F.3d 1531, 1540-41 (2d Cir. 1997) (finding "there is no authority for the proposition that New York courts would apply the law of one jurisdiction to a breach of contract claim and the law of another jurisdiction to an affirmative defense to that claim" and holding that the same law applies to both, even though the affirmative defense was alleged to sound in tort); see also Lloyds Bank PLC v. Repub. of Ecuador, No. 96 Civ. 1789 (DC), 1998 WL 118170, at *7-8 (S.D.N.Y. Mar. 16, 1998) (applying choice of law provision to both the contract claim and the affirmative defense).

Hotels USA, Inc., 322 F. Supp. 2d 482, 496 (S.D.N.Y. 2004). While Bermuda law differs materially from New York law on the availability of a "faithless servant" defense, that difference is not a basis to reject the parties' express choice. New York law will not supplant the parties' choice of law merely because its "own scheme of legislation may be different." Cooney v. Osgood Mach., Inc., 81 N.Y.2d 66, 80 (1993) (internal quotation marks and citation omitted). Difference alone, the New York Court of Appeals has observed, "is not enough to show that public policy forbids us to enforce the foreign right. . . . We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home." Id. (internal quotation marks and citation omitted, alteration in original) (under conflicts analysis, although New York public policy was contrary to Missouri, New York law would not apply). Supplanting the parties' choice of Bermuda law with New York law to permit Tyco to assert reliance on the "faithless servant" doctrine would be particularly inappropriate here, where a competing New York doctrine requires the application of Bermuda law. New York policy recognizes that the interest of the state of incorporation in governing that corporation's internal affairs is paramount and, accordingly, requires particular deference to the parties' contractual choice of the law of the jurisdiction where the corporation is incorporated.

b. The "Faithless Servant" Doctrine Is Not the Law of Bermuda.

Applying Bermuda law, Tyco's "faithless servant" defense fails as a matter of law. As Mr. Froomkin explains in his Bermuda law declaration, the "faithless servant" doctrine that Tyco relied on to deny Mr. Kozlowski the Lump Sum Amount is *not* the law of Bermuda.[41] Moreover,

[41] Ex. 2, Froomkin Decl. ¶ 5C.

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the doctrine has no equivalent under the law of Bermuda.[42] "The doctrine also is not, and has no equivalent under, the British common law, to which Bermuda courts look for guidance in the absence of specific Bermuda authority."[43]

The remedy for a breach of fiduciary duty under Bermuda law follows the well-settled British common law and is limited to compensation for the loss caused by the breach.[44] In fact, in Fassihi & Ors v. Item Software (UK) Ltd., [2004] B.C.C. 994 (appeal taken from Eng.), the English Court of Appeals explicitly rejected the argument that Tyco makes here, and held that a company director should not forfeit his compensation as a remedy for engaging in misconduct but should owe damages only to the extent of the loss resulting from the misconduct.[45] After exhaustively reviewing English, Irish, New Zealand, Australian and Canadian authorities on the topic, Justice Holman rendered the opinion of the Court, concluding:

> In my view, even in the case of dismissal for misconduct, it is not right that the employee should be deprived of remuneration for work actually done; although he may be liable to his employer for damages flowing from his misconduct.

Id. at 1018; see also Miles v. Wakefield Metro. Dist. Council, [1987] 1 A.C. 539, 570 (H.L.) (appeal taken from Eng.) (per Lord Oliver, "[a]n employee, for instance, who is rightly dismissed from his employment can recover salary which has become due and payable at the date of his dismissal"), (citing Boston Deep Sea Fishing & Icing Co. Ltd. v. Ansell, (1888) 39 Ch.D. 339

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[42] Id.

[43] Id.; see also In re Tyco Int'l Ltd., 340 F. Supp. 2d at 96.

[44] Ex. 2, Froomkin Decl. ¶ 5B-C; Ex. 3, Decl. Saul M. Froomkin (Oct. 7, 2008), In re Tyco Int'l Ltd. Sec. Litig., MDL Docket No. 02-1335-B (PJB) (D.N.H.) ("Froomkin 2008 Decl.") ¶ 6.

[45] Froomkin 2008 Decl. ¶ 8.

(A.C.)). As Fassihi and the authorities on which it relies demonstrate, under the governing law of Bermuda, forfeiture of earned compensation is not a remedy for misconduct by an employee.

c. Even Under New York Law, Tyco Would Not Be Entitled To Claw Back Mr. Kozlowski's Compensation.

Even if the New York "faithless servant" doctrine applied to this claim for breach of contract, which it does not, it would not be a defense to payment because, as a matter of law, Tyco cannot meet the doctrine's requirements for forfeiture.

Under New York law, "[t]o show a violation of the faithless servant doctrine, an employer must show (1) that the employee's disloyal activities were related to the performance of his duties, and (2) that the disloyalty permeated the employee's service in its most material and substantial part." Sanders v. Madison Square Garden, L.P., No. 06 Civ. 589 (GEL), 2007 WL 1933933, at *3 (S.D.N.Y. July 2, 2007), (quoting Phansalkar v. Andersen Weinroth & Co., L.P., 344 F.3d 184, 200, 203 (2d Cir. 2003)); see also Abramson v. Dry Goods Refolding Co., 166 N.Y.S. 771, 773 (N.Y. App. Term 1st Dep't 1917) (forfeiture appropriate where the "dishonesty and disloyalty on the part of [the] employee . . . permeates the employee's service in its most material and substantial part"); Pictorial Films v. Salzburg, 106 N.Y.S.2d 626, 630-31 (N.Y. Sup. Ct. 1951) ("the dishonesty must be of such a character as would justify the conclusion that the contract of employment was violated 'in a most material and substantial part.'"), (quoting Turner v. Konwenhoven, 100 N.Y. 115, 120 (1885)).

Tyco's assertion of the "faithless servant" doctrine is unsustainable under this high standard, not least because it is at odds with the position Tyco has taken through nearly eight years of litigation in the MDL proceedings. Tyco has insisted since 2002 that the alleged incidents of "looting" were "isolated events" during a period when Tyco enjoyed one of the most dramatically successful periods of growth and creation of shareholder value in the history of corporate America. By its own account, Tyco was extremely successful under Mr. Kozlowski and after him. In light of those admissions, Tyco cannot seriously contend that Mr. Kozlowski's stewardship of the company over the seven-year period for which it demands forfeiture of ***all*** compensation – 1995 to 2002 – was "permeate[d] . . . in its most material and substantial part" by misconduct. See Abramson, 166 N.Y.S. at 773.

Ignoring Tyco's admitted success during Mr. Kozlowski's tenure in favor of the sweeping, unprecedented remedy that Tyco demands not only would deprive Mr. Kozlowski of compensation fairly earned and contractually due, but also would provide an unconscionable windfall to Tyco. That is no more the law of New York than it is of Bermuda. As one New York court recently held in rejecting a similar claim, applying the New York "faithless servant" doctrine to require complete forfeiture of compensation for a multi-year period:

> would result in a totally unjustified windfall for the Plaintiffs. . . . Essentially, Defendant would have provided six years of business services (each year of which Plaintiffs met their business goals, and each year of which was profitable for Plaintiffs) for free. Nothing in the allegations of the Complaint or in the applicable law could justify this result.

Seven Hanover Assocs., LLC v. Jones Lang Lasalle Americas, Inc., No. 04 Civ. 4143 (PAC), 2008 WL 464337, at *5 (S.D.N.Y. Feb. 19, 2008). The relief Tyco seeks is even more drastic and less warranted – where the defendant in Seven Hanover was charged with certain narrowly defined management tasks, Mr. Kozlowski was charged with the overall stewardship of the entire company, which by Tyco's own account grew under his watch into a resoundingly successful global conglomerate.[46] Mr. Kozlowski was at the helm during that period of

[46] Compare Ex. 12, Tyco Labs. Inc., Annual Report (Form 10-K), at 9, 19 (Sept. 17, 1993) (reporting income and earnings) with Ex. 17, Tyco Int'l Ltd., Annual Report (Form 10-K), at 18 (Dec. 28, 2001) (reporting income and earnings).

undisputed success and, whatever his faults, should not be stripped of all compensation earned for it.

In short, Tyco has refused to pay Mr. Kozlowski based solely on a New York doctrine that does not apply and that would not permit the relief sought. By doing so, it breached the contract, and judgment is warranted as a matter of law.

## II. Tyco is Required to Indemnify Mr. Kozlowski for *Stumpf v. Garvey*.

Tyco is also obligated to pay Mr. Kozlowski in connection with a separate claim – his demand for indemnification of costs and expenses in Stumpf v. Garvey, an action involving the IPO and secondary-market sale of shares in Tyco's telecommunications subsidiary, TyCom. As Tyco vigorously and successfully has argued, Mr. Kozlowski's criminal convictions and alleged looting have absolutely nothing to do with the allegations in Stumpf. The only surviving claims against Mr. Kozlowski are ***identical*** to the claims against Tyco and relate exclusively to alleged misstatements in TyCom's IPO prospectus and registration statement. These are precisely the type of acts by a corporate officer for which Tyco's Bye-Laws explicitly indemnified Mr. Kozlowski – but Tyco refuses to pay. That refusal is unexcused, and judgment is warranted as a matter of law.

### A. The Allegations Against Mr. Kozlowski Relate Exclusively to Actions He Performed as a Corporate Officer and Director.

Stumpf is a garden-variety securities class action, involving allegations that plaintiffs (i) bought shares of a former Tyco subsidiary at prices inflated by misrepresentations in its prospectus and registration statements, and (ii) suffered losses when the share price fell. Stumpf v. Garvey, No. 03 Civ. 1532 (PB), 2006 WL 39237, at *1-6 (D.N.H. Jan. 6, 2006). As Tyco puts it, the Stumpf plaintiffs allege that they suffered damages "when, independent of the general telecom decline, their share price dropped because the market learned in early 2001 that predictions in TyCom's July 2000 IPO Prospectus about future bandwidth demand were false." SUF ¶ 28.

Plaintiffs allege that Tyco and Mr. Kozlowski, its CEO at the time, are liable under the securities laws because they are responsible for the alleged misstatements in TyCom's prospectus and registration statement. SUF ¶ 23. The alleged misrepresentations and the alleged disclosure relate to the expected demand for bandwidth on TyCom's undersea network, however, not to any individual action or statement by Mr. Kozlowski. Indeed, although the TyCom plaintiffs had initially attempted to piggy-back on the allegations of "looting" raised in other cases, Tyco successfully persuaded the MDL Court to reject those arguments outright. Stumpf, 2006 WL 39237, at *1. The MDL Court struck all claims against Mr. Kozlowski and Tyco related to "looting" from the action, granting in part the defendants' motions to dismiss. SUF ¶ 24. In its decision, the MDL Court pointed out that the plaintiffs could not have suffered any losses to the value of their TyCom stock due to disclosures of looting in 2002, because TyCom stock *no longer existed* in 2002 – Tyco had repurchased it all in December 2001. As the Court concluded, "[b]ecause it is undisputed that there were no outstanding shares of Tycom stock when the looting was discovered, the looting could not have caused the Tycom stock devaluation." Stumpf , 2006 WL 39237, at *1; see also Stumpf v. Garvey, No. 03 Civ. 1532 (PB), 2005 WL 2127674, at *12 n. 14 (D.N.H. Sept. 2, 2005).

Nearly four years later, in their motions for summary judgment on the remaining claims, Tyco and Mr. Kozlowski continued to agree that the Stumpf action has nothing to do with any alleged dishonesty or fraud by Mr. Kozlowski against the company. Id. ¶ 26. Tyco forcefully argued that whether or not "Kozlowski and Swartz took unauthorized payments from *Tyco*

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months *after* the [TyCom] IPO has no bearing on whether TyCom knew projections [regarding demand for bandwidth]" included in the Prospectus "were sound" – the sole remaining dispute in the TyCom litigation. Id.

B. Under Tyco's Bye-laws, Mr. Kozlowski is Entitled to Indemnification.

Allegations like those in Stumpf are precisely the kind of claims for which Mr. Kozlowski was indemnified under Tyco's Bye-Laws. Tyco indemnified all officers and directors of the company, Mr. Kozlowski included, against "all costs, losses and expenses" which they "may incur or become liable to by reason of any contract entered into, or any act or thing done by him as such officer, or in anyway in the discharge of his duties" – including signing offering documents in his capacity as CEO. The only reason indemnification may be denied under the Bye-Laws is if such indemnification would be "void under" the Bermuda Companies Act, SUF ¶ 27 – and the only indemnification prohibited by the Act requires an act ***against*** the Company, not in concert with it, as the Stumptf plaintiffs allege.[47]

Section 98 of the Bermuda Companies Act of 1981 ("Companies Act") governs the permissible scope of indemnification of an officer by a company and gives Bermuda companies broad latitude to indemnify their officers and directors. Section 98 is explicit: a company may indemnify an officer for "***any*** loss arising or liability attaching to him by virtue of any rule of law in respect of any negligence, default, breach of duty or breach of trust of which the officer or person may be guilty in relation to the company or any subsidiary thereof." Companies Act, § 98(1). However, a company may not indemnify an officer against any liability which "by virtue of any rule of law would otherwise attach to him in respect of any fraud or dishonesty of which he may be guilty in relation to the company." Companies Act, § 98(2). As Mr. Froomkin states in his declaration, the "provisions in [Tyco's] Bye-Law 102 are standard industry practice in Bermuda, and to my knowledge their efficacy has never been questioned"[48]: under their plain terms, indemnification is prohibited only for "fraud or dishonesty *in relation to the company*," not for statements made on the company's behalf for which the company is alleged to be equally liable.[49]

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[47] Ex. 2, Froomkin Decl. ¶ 5D.

The fact that the Stumpf complaint contains allegations of fraud is not a basis to deny indemnity. The allegations are the same against Mr. Kozlowski, Tyco and TyCom, and do not include a single surviving claim that Mr. Kozlowski deceived *Tyco* in connection with the TyCom Prospectus or IPO. The only misrepresentations attributed to Mr. Kozlowski are those in the prospectus and registration statement, and they are attributed equally to Tyco. Stumpf , 2005 WL 2127674, at *8-9. Moreover, Tyco has admitted that Stumpf does not involve any claim of "fraud or dishonesty" by Mr. Kozlowski against the company – which would be the sole basis to deny him indemnification under Tyco's Bye-Laws. That Mr. Kozlowski is a defendant in *other* actions, including this one, which do involve such allegations is irrelevant as a matter of Bermuda law. Each claim for indemnification must be considered independently, on its own merits under the plain language of the Bye-Laws and the Companies Act.[50] Applying that standard to the undisputed facts regarding Stumpf, Bermuda law and Tyco's Bye-Laws require indemnification.

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[48] Id. ¶ 5D(iii).

[49] Id. ¶ 5D.

[50] Id. ¶ 5D(iii)-(vi).

It has been more than four years since the looting allegations in the Stumpf litigation were dismissed. During that entire time – including fact and expert discovery and summary judgment briefing – Mr. Kozlowski has been bearing his own costs and expenses, while Tyco has refused, without any basis in Bermuda law, to provide indemnification. SUF ¶ 28. Under Bermuda law, Tyco's refusal to indemnify Mr. Kozlowski for Stumpf is a plain breach of Tyco's own Bye-laws, and judgment should be granted as a matter of law.

## CONCLUSION

For the reasons stated above, Mr. Kozlowski respectfully requests that the Court grant his motion for partial summary judgment that Tyco (i) has breached the Executive Retirement Agreement and is required to pay him the Lump Sum Amount under that contract and (ii) is required to indemnify Mr. Kozlowski for his costs and expenses in Stumpf v. Garvey.

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Respectfully submitted,

_/s/[Jyotin Hamid]_______________________

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